

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ENUMCLAW SCHOOL DISTRICT,
SOUTHWOOD ELEMENTARY SCHOOL,

Appellant,

V.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 80-15

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of two civil penalties of \$250 each for blowing sand allegedly in violation of respondent's Section 9.11(a), 9.04 and 9.15(c) of Regulation I, came on for hearing before the Pollution Control Hearings Board, Nat W. Washington, Chairman, and David Akana, member, convened at Tacoma, Washington, on May 23, 1980. Hearing Examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by Wendy Krakauer, Deputy Prosecuting

1 Attorney. Respondent appeared by its attorney, Keith D. McGoffin.

2 Reporter Kim Otis recorded the proceedings.

3 Witnesses were sworn and testified. Exhibits were examined. From
4 testimony heard and exhibits examined, the Pollution Control Hearings
5 Board makes these

6 FINDINGS OF FACT

7 I

8 Respondent, pursuant to RCW 43.21B.260 has filed with this Board a
9 certified copy of its Regulation I containing respondent's regulations
10 and amendments thereto of which official notice is taken.

11 II

12 This matter concerns the Southwood Elementary School in Enumclaw.
13 The appellant, Enumclaw School District, determined to add two soccer
14 fields to the school grounds there. Because playing soccer on
15 unprepared fields had turned the fields to mud, a bond issue was
16 passed to finance grass soccer fields underlain with sand for good
17 drainage. Work began on the two fields in March, 1979. The sand was
18 not in place until the end of October, 1979.

19 III

20 The complainants, Mr. and Mrs. Pettelle, reside across the street
21 from the two soccer fields. They live upon 20 acres so that their's
22 is the only home opposite the fields. Until these events Mr. Pattelle
23 operated an automobile repair service on the premises and complainants
24 also raise cattle and sheep there for their own use.

25 On November 6, 1979, wind blew sand from the unseeded soccer
26 fields onto the complainants land and into their house. The sand was

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1 in such quantity as to require eye protection before going outdoors,
2 and caused coughing and sinus irritation to the Pattelles, eye
3 irritation to their stock, and loose sand within their home despite
4 earnest attempts to keep it out.

5 On November 13, 1979, at a meeting of the Board of Education of
6 the Enumclaw School District, Mrs. Pettelle personally appeared,
7 notified the Board of the blowing sand and requested relief. The
8 Superintendant assured Mrs. Pattelle, in the Board's presence, that
9 every possible means to keep the sand on the soccer fields would be
10 explored. Subsequently the school obtained a 1-1/2" diameter fire
11 hose for wetting down the sand. Employees under the federal CETA
12 program hand seeded field No. 2 but that arrangement terminated before
field No. 1 was seeded.

14 IV

15 On November 27, 1979, severe winds blew sand from both the seeded
16 and unseeded fields onto and into the Pettelle's home. The sand came
17 with such force and in such quantity that the Pattelle family left
18 their home and went to a nearby motel to spend the night.

19 On November 28, 1979, upon returning, the Pattelles found
20 quantities of sand throughout their house, a covering of sand over
21 their house and fields, stock with irritated eyes, the drainage ditch
22 along the road filled with sand and sand still blowing from the soccer
23 fields at a rate requiring eye protection while outdoors on their
24 property. The Pattelles complained to respondent, Puget Sound Air
25 Pollution Control Agency. Respondent's inspector arrived at the
26 Pattelle's home at approximately 9:30 a.m. and verified the source and
27

1 affect of the blowing sand. Thereafter the inspector visited the
2 Southwood Elementary School to find that CETA personnel were wetting
3 the soccer fields with the 1-1/2" fire hose. This hose was deficient
4 in size and did little if anything to retard the blowing sand from
5 both the seeded and unseeded soccer fields. The inspector brought the
6 Pattelle's problem to the attention of the school Superintendant who
7 was at the school, and who stated he was previously aware of the
8 blowing sand and its effect upon the Pattelles. The inspector
9 suggested that a water truck be employed to prevent the sand from
10 becoming airborne.

11 Subsequently, the School District called in a fire truck to water
12 the fields, organized school buses into a windbreak, lined up hay
13 bales for further windbreaks, and scraped the sand from unseeded field
14 No. 1 into piles which were covered with plastic weighted by tires.
15 The tires and other materials had to be obtained by a call to the
16 community for voluntary donation.

17 Appellant, School District, later received a Notice and Order of
18 Civil Penalty citing violation of Sections 9.04, 9.11(a) and 9.15(c)
19 of respondent's Regulation I and assessing a civil penalty of \$250 for
20 the events of November 28, 1979. From this appellant appeals.

21 V

22 On December 28, 1979, a more normal wind blew sand from both
23 soccer fields onto the Pattelle home and acreage. Despite efforts to
24 seal the cracks around doors the interior of the Pattelle home was
25 again beset by the sand. The quantity of sand in the air forced Mrs.
26 Pattelle to leave her home during the day and stay with neighbors.

1 Stock was again affected but were sheltered in the barn to avoid
2 further injury. Pasture grass died under the covering of sand from
3 the soccer fields. Mr. Pattelle had ceased his auto repair work on
4 the premises because blowing sand from the soccer fields made that
5 work difficult or impossible. There were about 28 days during
6 November and December when auto repair, Mr. Pattelle's occupation,
7 could not be carried out on the premises due to blowing sand from the
8 soccer fields. Mr. Pattelle has relocated his auto repair to a garage
9 in town. The Pattelles filed another complaint with respondent whose
10 inspector again verified source and effect of the sand. The inspector
11 went to the school, and before leaving his car was approached by the
12 appellant's business manager who acknowledged the problem of blowing
13 sand. On the prior day, December 27, 1979, the appellant had obtained
14 the service of a "hydroseeder" to apply a mixture of grass seed and
15 "tacking" agent to the soccer fields as is done on the banks of
16 freeway cuts. The equipment failed with one field half done, and the
17 hydroseed tacking agent itself blew onto the Pattelles lot to a
18 limited extent. The hydroseeding was not resumed until January 15,
19 1980.

20 Appellant, School District, later received a Notice and Order of
21 Civil Penalty citing violation of Sections 9.04 and 9.11(a) of
22 respondent's Regulation I and assessing a civil penalty of \$250 for
23 the events of December 28, 1979. From this appellant appeals.

24 VI

25 Appellant was not shown to have any prior record of violating
26 respondent's regulations.

VII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board makes the following

CONCLUSIONS OF LAW

I

Section 9.04 of respondent's Regulation I provides:

Section 9.04 PARTICULATE MATTER

It shall be unlawful for any person to cause or allow the discharge of particulate matter which becomes deposited upon the real property of others, except as follows:

- (1) When such emissions are proved by such person to be in compliance with Section 9.09.
- (2) Temporarily due to breakdown of equipment, provided that repairs are promptly made.
- (3) During the time for compliance with this Regulation fixed by the Control Officer or the Board.

"Particulate matter" means any material, except water in an uncombined form, that is or has been airborne and exists as a liquid or a solid at standard conditions. Section 1.07(w) of respondent's Regulation I. This includes the windblown sand in question. Appellant allowed the discharge of particulate matter which became deposited upon the real property of others upon both November 28, and December 28, 1979, and thus twice violated respondent's Section 9.04 of Regulation I.

Appellant contends that the provisions of Section 9.04(2) concerning temporary breakdown of equipment applies to the failure of the hydroseeder on December 27, 1980. That subsection requires prompt repair of the broken down equipment whereas the hydroseeding, once terminated, was not resumed for 19 days. Appellant is therefore not entitled to the exculpatory provisions of Section 9.04(2)

II

Section 9.11(a) of respondent's Regulation I provides:

SECTION 9.11 EMISSION OF AIR CONTAMINANT OR WATER VAPOR: DETRIMENT TO PERSON OR PROPERTY

(a) It shall be unlawful for any person to cause or permit the emission of an air contaminant or water vapor, including an air contaminant whose emission is not otherwise prohibited by this Regulation, if the air contaminant or water vapor causes detriment to the health, safety or welfare of any person, or causes damage to property or business.

"Air contaminant" includes particulate matter which includes the blowing sand in question. See Conclusion of Law I, above and Section 1.07(b) of respondent's Regulation I. "Emission" is the "release into the outdoor atmosphere of air contaminants." Section 1.07(j).

"Detriment to the welfare of any person" is an independent element of Section 9.11(a) but is not further defined by that Section. We therefore turn for guidance to the Policy of Regulation I, Section 1.01. It states there:

It is hereby declared to be the public policy of the Puget Sound Air Pollution Control Agency to secure and maintain such levels of air quality as will . . . foster the comfort and convenience of its inhabitants . . ."

The antithesis of that air quality is "air pollution" defined at Section 1.07(c) of Regulation I as:

. . . presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration . . . which unreasonably interfere with enjoyment of life and property. (emphasis supplied)

We therefore construe the element of Section 9.11(a) prohibiting "detriment to the welfare of any person" as prohibiting unreasonable

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1 interference with the enjoyment of life and property.¹ Appellant
2 caused detriment to the welfare of the Pattelles by causing the
3 emission of air contaminants in sufficient quantities and of such
4 characteristics and duration as unreasonably interfered with their
5 enjoyment of life and property upon both November 28, and December 28,
6 1979, thus twice violating Section 9.11(a) of respondent's Regulation
7 I.

8 III

9 Section 9.15 of respondent's Regulation I provides:

10 SECTION 9.15 PREVENTING PARTICULATE MATTER FROM 11 BECOMING AIRBORNE

12 (a) It shall be unlawful for any person to
13 cause or permit particulate matter to be handled,
14 transported or stored without taking reasonable
15 precautions to prevent the particulate matter from
16 becoming airborne.

17 (b) It shall be unlawful for any person to
18 cause or permit a building or its appurtenances or
19 a road to be constructed, altered, repaired or
20 demolished without taking reasonable precautions to
21 prevent particulate matter from becoming airborne.

22 (c) It shall be unlawful for any person to
23 cause or permit untreated open areas located within
24 a private lot or roadway to be maintained without
25 taking reasonable precautions to prevent
26 particulate matter from becoming airborne.

27 On the morning of November 28, 1979, the 1-1/2" fire hose being
solely employed to prevent windblown sand did not constitute a
reasonable precaution toward that end. Appellant therefore failed to

1. This standard is not unlike the definition of actionable
nuisance. See RCW 7.48.010.

1 take reasonable precautions to prevent particulate matter from
2 becoming airborne. Appellant thus violated respondent's Section
3 9.15(c) or, alternatively and upon the same proof, Section 9.15(b) of
4 Regulation I. See, by analogy, CR 15(b) concerning amendment of the
5 pleadings to conform to the evidence.

6 IV

7 Appellant cites the case of Puget Sound Air Pollution Control
8 Agency v. Kaiser Alum. & Chem. Corp. 25 Wn. App 273, 607 P. 2d 870
9 (DIV II, 1980); petition for review denied ____ Wn2d ____ (1980), for
10 the proposition that respondent's rules are not consistent with the
11 Clean Air Act, chapter 70.94 RCW which they implement, and are
12 therefore invalid. The Clean Air Act declares that it shall be
unlawful to knowingly cause or permit air pollution. RCW 70.94.040.
14 (emphasis added) The Court of Appeals in Kaiser reviewed the
15 assessment of civil penalties under a rule of respondent, like those
16 rules now before us, not requiring knowledge. The Court of Appeals
17 found:

18 There is no indication that Kaiser knew that
19 alumina was leaking or escaping until that fact was
20 brought to the attention of Kaiser's supervisory
employees by the inspector. (emphasis added)

21 The Court of Appeals then stated:

22 We hold, therefore, that subsection 9.03(b) of
23 PSAPCA's Regulation I, as it is herein
24 administered, is unenforceable as an attempt to
promulgate an administrative rule in excess of the
agency's powers. (emphasis added)

25 We conclude that appellant knew of the blowing sand at the time
of its occurrence as well as its impact upon the Pattelles, that such

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1 facts distinguish this case from Kaiser, and that the respondent's
2 rules are not unenforceable as herein administered.

3 V

4 The efforts made by appellant to prevent the sand from becoming
5 airborne, largely the product of voluntary or community action, and
6 its good prior record justify partial mitigation of the penalty by
7 suspension.

8 VI

9 Any Finding of Fact which should be deemed a Conclusion of Law is
10 hereby adopted as such.

11 From these Conclusions the Board enters this

12 ORDER

13 Each \$250 civil penalty is affirmed; provided, however, that one
14 half of each civil penalty (\$250 total) is suspended on condition that
15 appellant not violate respondent's Regulations for a period of one
16 year from the date of this Order.

17 DONE at Lacey, Washington, this 13th day of June, 1980.

18 POLLUTION CONTROL HEARINGS BOARD

19
20
21 Mat W. Washington
MAT W. WASHINGTON, Chairman

22
23 David Akana
24 DAVID AKANA, Member

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